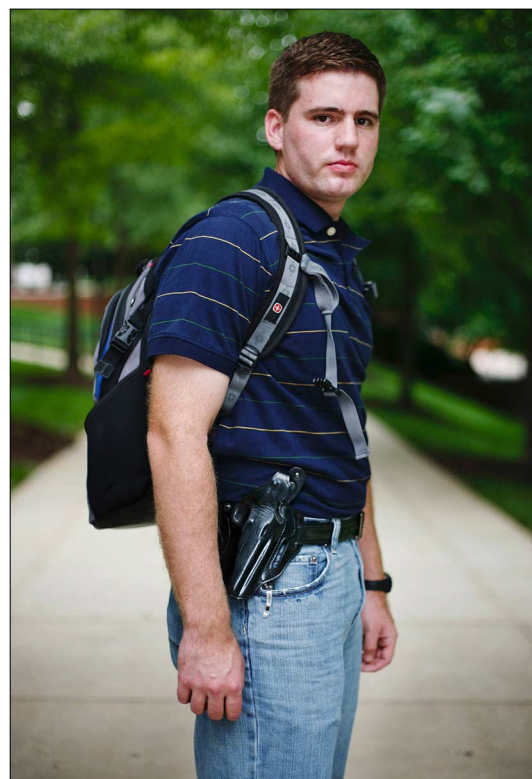


Gun Rights Debates

Should restrictions on firearms be relaxed?

The Supreme Court gave gun rights advocates a major victory on June 26, recognizing for the first time an individual right under the Second Amendment to own and possess firearms. The 5-4 decision struck down a handgun ban adopted by the District of Columbia in 1976. Gun rights advocates the very same day began challenging similar bans in Chicago and elsewhere. In his majority opinion, Justice Antonin Scalia said the decision did not invalidate laws establishing qualifications to buy weapons, limiting the carrying of weapons in “sensitive” places or barring possession by felons or the mentally ill. Dissenting justices argued the ruling misinterpreted the history of the Second Amendment and would lead the court into striking down many gun laws. Gun control groups hope the ruling sets the stage for more reasoned debate over gun regulations by removing the specter of confiscation of weapons. But gun owners plan to use the ruling to challenge licensing schemes and to urge state legislators to ease restrictions on carrying weapons in public.



Andrew Dysart, a student at George Mason University in Fairfax, Va., wears an empty holster on campus last year following the shootings at Virginia Tech. The ex-Marine wants students to be able to carry concealed guns on campus for protection.

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MANAGING EDITOR: Thomas J. Colin
tcolin@cqpress.com

ASSISTANT MANAGING EDITOR: Kathy Koch
kkoch@cqpress.com

ASSOCIATE EDITOR: Kenneth Jost

STAFF WRITERS: Thomas J. Billitteri,
Marcia Clemmitt, Peter Katel

CONTRIBUTING WRITERS: Rachel S. Cox,
Sarah Glazer, Alan Greenblatt,
Barbara Mantel, Patrick Marshall,
Tom Price, Jennifer Weeks

DESIGN/PRODUCTION EDITOR: Olu B. Davis

ASSISTANT EDITOR: Darrell Dela Rosa

FACT-CHECKER/PROOFREADER: Eugene J. Gabler

EDITORIAL INTERNS: Alexis Irvin, Vyomika Jairam



PRESIDENT AND PUBLISHER:
John A. Jenkins

EXECUTIVE DIRECTOR,
REFERENCE INFORMATION GROUP:
Alix B. Vance

DIRECTOR, ONLINE PRODUCT DEVELOPMENT:
Jennifer Q. Ryan

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Gun Rights Debates

BY KENNETH JOST

THE ISSUES

Joseph Tartaro, the long-time executive editor of *Gun Week* magazine, looked out at a meeting room filled with hundreds of gun owners and gun rights advocates and announced that, at last, good times had arrived.

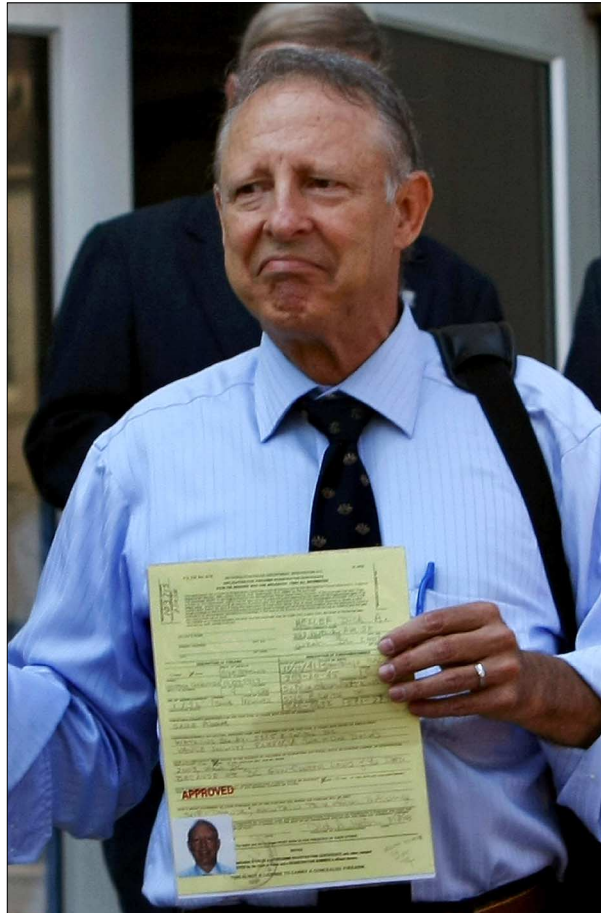
Thirty years earlier, Tartaro told the Second Amendment Foundation's annual conference in Phoenix on Sept. 28, only four states allowed the carrying of concealed weapons in public. And the District of Columbia had just enacted one of the strictest gun control laws in the country.

Today, explained Tartaro, the foundation's president, more than 40 states have so-called "shall issue" laws that allow carrying concealed firearms in public. And three months earlier — on June 26 — the Supreme Court had struck down Washington's handgun ban. The precedent-setting decision established an individual right to own and possess firearms for self-defense, at least in one's home.

"We've reached the good days," Tartaro continued. More handguns are being sold than at any other time in history. Long gun sales would be up too but for the bad economy. "People have discovered," he said, "that guns are not as scary as they thought they were."

"Law-abiding people should be able to defend themselves, their families and their communities," Tartaro concluded.¹

Gun rights advocates indeed have much to celebrate thanks to the Supreme Court's *District of Columbia v. Heller* decision, which transforms a



Private security guard Dick Heller, who challenged Washington, D.C.'s strict handgun ban, leaves police headquarters with a new gun permit on Aug. 18, 2008, after the U.S. Supreme Court struck down the ban. Although the decision transformed a decades-long debate over the Second Amendment, gun control and gun rights experts disagree on the likely impact of the ruling.

Getty Images/Mark Wilson

decades-long dispute over the meaning of the Second Amendment. The awkwardly phrased 27-word provision proclaims: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Following a 1939 Supreme Court decision, federal courts had ruled all but uniformly for more than 60 years that the amendment's opening clause limited its scope to protecting the states' rights to organize militias. But the amendment did not establish an individual right to

own or possess firearms, courts held. Under the so-called collective-right view, Congress and state and local governments remained largely free to regulate guns as they saw fit.

Gun rights advocates stepped up their efforts to challenge that doctrine in the 1960s and '70s. Over time, they gained support for their claim that the amendment established an individual right — first from many politicians, then from some academics and eventually from the general public.

The Supreme Court finally took up the issue after the federal appeals court for the District of Columbia struck down the D.C. gun ban in March 2007. The high court's 5-4 ruling gave gun rights advocates the victory they had awaited for so long.

Writing for the majority, Justice Antonin Scalia said the amendment established an individual right for "law-abiding, responsible citizens to use arms in defense of hearth and home." D.C.'s ban on handguns — the "quintessential self-defense weapon" — was invalid, he

said, along with the law's provision requiring that any weapons in the home be either disassembled or trigger-locked.

Writing for the four dissenters, Justice John Paul Stevens said the ruling upset a "settled understanding" that the Second Amendment allowed virtually unlimited regulation of civilian use of firearms. He said the D.C. gun ban could be "just the first of an unknown number of dominoes to be knocked off the table."² (See box, p. 892.)

Leading advocates and experts disagree on the likely impact of the ruling. "Many laws [regulating guns] will

D.C. Gun Ban Case Split Supreme Court

The Supreme Court divided along ideological lines in its 5-4 decision striking down the District of Columbia's 32-year-old handgun ban. Justice Antonin Scalia wrote for a majority that included four other conservatives: Chief Justice John G. Roberts Jr. and Associate Justices Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr. Justice John Paul Stevens wrote the major dissenting opinion, joined by three other liberal justices: David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.



Roberts

Getty Images/Paul J. Richards (5)



Scalia



Kennedy



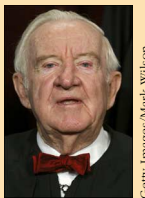
Thomas



Alito

"The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence], including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. . . . [I]t is not the role of this Court to pronounce the Second Amendment extinct."

District of Columbia v. Heller (From majority opinion by Justice Scalia)



Stevens

Getty Images/Mark Wilson



Souter

AFP/Getty Images/Paul J. Richards



Ginsburg

Getty Images/Mark Wilson



Breyer

AFP/Getty Images/Brendan Smialowski

"The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court . . . to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice."

District of Columbia v. Heller (From dissenting opinion by Justice Stevens)

Source: Supreme Court of the United States, www.supremecourtus.gov/opinions/07pdf/07-290.pdf.

be upheld — the laws that make more sense," says Alan Gura, the Alexandria, Va., lawyer who successfully represented D.C. private security guard Dick Heller and other plaintiffs in challenging the gun ban. "But laws that serve no legitimate governmental purpose but merely serve to harass gun owners, laws that make gun owning difficult or expensive — those laws are going to be struck down."

Gun control advocates are playing down the possibility that lots of gun regulations are now in constitutional jeopardy. They emphasize passages in Scalia's opinion that limit the Second Amendment right to weapons "in common use" and that leave standing laws setting "conditions and qualifications" on the commercial sale of arms.

"We're actually quite encouraged by comments that the majority made in the course of that decision offering some reassurance that some very broad categories of gun laws . . . are what the court called presumptively lawful," says Dennis Henigan, vice president for law and policy at the Brady Center to Prevent Gun Violence in Washington, the non-partisan policy arm of the Brady Campaign to Prevent Gun Violence, a political action committee.

A leading gun rights lawyer for the National Rifle Association (NRA) somewhat similarly plays down the likely impact of the ruling. "It's not as though all the gun regulations in the country are going to go by the wayside," says Stephen Halbrook, author of a number of pro-gun rights books and articles. But Halbrook says the court's decision represents "a tremendous moral defeat" for gun control advocates.

Other academic experts disagree. "In practice, the legislatures are not that limited in the kind of gun controls they can pass," says Gary Kleck, a professor at Florida State University's College of Criminology and Criminal Justice in Tallahassee, who describes himself as a supporter of "a

moderate amount” of gun control. “They can do virtually everything they could before the decision.”

But Philip Cook, a professor of economics and sociology at Duke University in Durham, N.C., and a supporter of stronger regulation, says gun control supporters are engaging in “happy talk” when they minimize the ruling’s potential effects. “The decision has been a litigation magnet,” says Cook. “At this point it remains hard to say how far the Supreme Court and the [federal] circuit courts are going to push this.”

The Second Amendment Foundation, in fact, filed the first post-*Heller* lawsuit on the same day of the decision, challenging a Chicago handgun ban similar to the D.C. law. The NRA followed with a package of suits challenging handgun bans in Chicago and several nearby suburbs. Separately, the foundation and other gun rights groups challenged a San Francisco provision banning handguns in public housing.

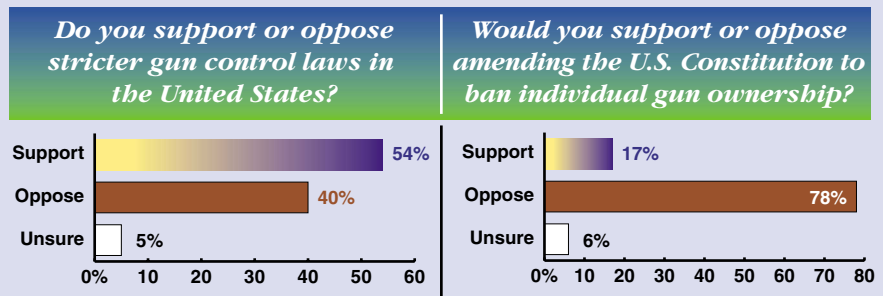
Criminal defendants in federal courts are also citing the *Heller* decision to try to set aside sentence enhancements under federal provisions increasing prison terms for use or possession of guns by offenders. So far, judges appear to be rejecting those arguments. But the Supreme Court is set to hear arguments on Nov. 10 testing a federal law making it a crime for someone convicted of domestic violence to own a gun.

The ruling is also renewing the debate touched off by the Virginia Tech shootings in April 2007 over college and university rules prohibiting possession of firearms on campuses.* A student group advocating the right of

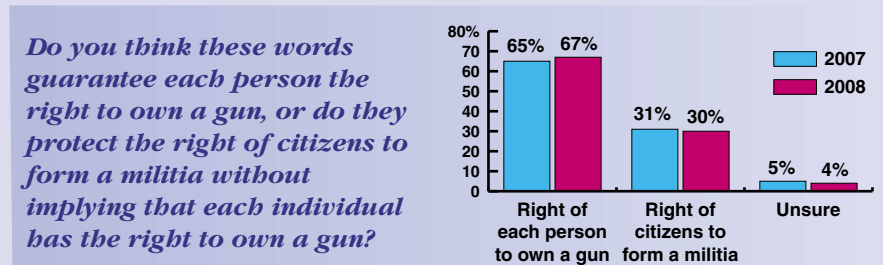
* On Oct. 25, two students were shot and killed outside a residence hall at Central Arkansas University. Four suspects were being held in what police say was not a random shooting. On Feb. 15, 2008, a former graduate student had shot and killed five students in a lecture hall at Northern Illinois University before shooting himself.

Americans Support Gun Rights, More Controls

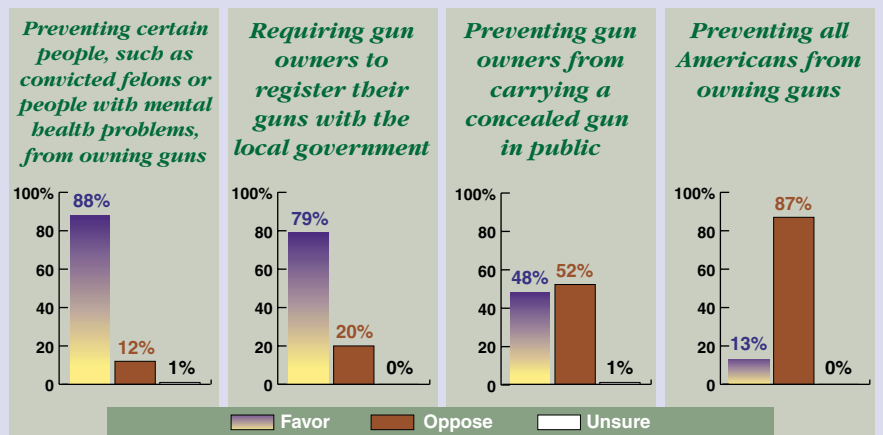
More than three-quarters of Americans oppose amending the Constitution to ban individual gun ownership, but more than half support stricter gun control laws. Even more support specific measures such as keeping guns out of the hands of felons and requiring purchasers to wait several days before receiving a gun.



The exact words of the Second Amendment to the Constitution are: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”



Thinking about specific ways that the government has dealt with guns in the past, do you favor or oppose each of the following? . . .



* Figures may not total 100 due to rounding.

Sources: CNN, Opinion Research Corporation, Quinnipiac University

licensed students to carry concealed weapons on campus claims to have attracted more than 30,000 members — but is also drawing criticism from gun control groups that say increasing the number of firearms will make campuses less instead of more safe.³ (See sidebar, p. 900.)

In Washington itself, the city council quickly responded to the Supreme Court decision by establishing a registration system for handguns while retaining other restrictions, including the requirement to store weapons disassembled or trigger-locked. The council adopted a significantly revised interim measure in September under the threat of a bipartisan measure in Congress to strip the district of all authority to regulate firearms. The new “emergency” legislation permits registration of semiautomatic pistols as well as single-shot pistols and eliminates the trigger-lock requirement. Those provisions are expected to be included in a permanent law to be adopted later. (See sidebar, p. 897.)

The *Heller* decision came at a time of relative quiet in the gun control debates — debates that often seem to be as much clashes of cultures and values as disagreements on law and policy. Gun control has receded as an issue over the past two years in Congress and state and local legislative bodies. Both major party presidential candidates endorsed the Supreme Court rul-

ing to recognize individual rights under the Second Amendment: Republican John McCain strongly, Democrat Barack Obama more ambiguously. (See sidebar, p. 903.)

Even so, gun regulations remain a volatile issue in courts and legislative bodies around the country. Here are some of the principal questions on the agenda:

to states and municipalities.

Chicago will present “a full-blown analysis that the Second Amendment has not been incorporated against the states,” says Michael Forti, a deputy corporation counsel in Chicago, referring to the legal doctrine of applying provisions of the Bill of Rights to the states. “We think this is an issue that is worth litigating.”⁴



Chicago Mayor Richard Daley, right, examines assault weapons with Assistant Deputy Superintendent of Police Matt Tobias. The mayor opposes a lawsuit filed by the Second Amendment Foundation challenging a Chicago handgun ban similar to the recently overturned D.C. law. The city says the Supreme Court decision on Washington's ban applies only to federal jurisdictions, not to states and municipalities. Separately, the foundation is also challenging a San Francisco provision banning handguns in public housing.

Should laws restricting ownership of firearms be relaxed?

Otis McDonald is a retiree in his 70s who lives on Chicago's far south side, a mixed-race area with middle-class homes and a relatively low crime rate. Still, McDonald recalls being threatened by members of a neighborhood gang outside his home a couple of years ago after reporting some information about a crime to police.

McDonald keeps a shotgun in his home for self-defense but under Chicago's ban on handguns has to store a pistol outside the city limits. Now, he is one of six Chicago residents who challenged the Chicago ordinance in federal court hours after the Supreme Court invalidated Washington's handgun ban.

Despite the high court ruling, Chicago is vigorously defending the measure. Mayor Richard Daley and Police Superintendent Jody Weiss have both criticized the decision as a threat to public safety. The city's lawyers are slowing down the lawsuit and preparing legal arguments to save the city ban by arguing that the Supreme Court decision applies only to federal jurisdictions, not

Getty Images/Scott Olson

Most experts and advocates assume the Second Amendment will eventually be held applicable to state and local governments. "Very likely," says Duke University's Cook. "The court defined it as a personal right."

Douglas Berman, a professor at Ohio State University's Morris College of Law, agrees. He is helping represent defendants in efforts to use the newly recognized right to challenge gun-related sentence enhancements in state and federal courts. "I'll be surprised if this is another of the rights that is not incorporated," Berman says. "I don't think the *Heller* five did this just to strike down one District of Columbia law."

Even without a ruling on that preliminary issue, gun rights advocates are also scoring some victories. Three Chicago-area suburbs with gun-control bans — Evanston, Morton Grove and Wilmette — responded to suits filed by the NRA by either repealing or modifying their laws to permit handguns in the home for self-defense. The village of Oak Park, however, is joining with Chicago in defending its ordinance. The NRA's suits against Chicago and Oak Park have been consolidated with the McDonald case in a proceeding in U.S. District Court.⁵

Gun control advocates hope the Supreme Court decision will leave most gun regulations intact. "There are very few bans out there," says Joshua Horwitz, executive director of the Coalition to Stop Gun Violence. "If that is all it applies to, it's just not going to be that big a deal." The Brady Center's Henigan predicts lower courts will uphold "a wide variety" of gun regulations.

The NRA's Halbrook also doubts existing gun regulations will be shot down wholesale. "A lot of us are in agreement on a lot of gun laws," he says. But both the NRA and the somewhat harder-line Gun Owners of America are eyeing future challenges to local licensing systems — most prominently, New York City's — that make registering firearms very hard.

Licensing can be "a distinction without a difference," says Larry Pratt, Gun Owners' executive director. Florida State's Kleck says New York City makes it virtually impossible to register a gun except for former police officers or politically connected applicants.

Pratt says licensing schemes will be challenged eventually, but not right away. "You want to go one step at a time," he says. But Horwitz worries that passages in Scalia's opinion depicting the Second Amendment right as a check on governmental power leave licensing laws in jeopardy. "If the right is a core protection against the government, then licensing and registration may not be OK," he says.

The court's ruling also sets the stage for skirmishes over bans on specific types of weapons. "Bans on certain classes of weapons will be OK," Horwitz says. "It has to be fleshed out." Henigan notes that state courts interpreting gun rights provisions in their own state constitutions have generally upheld bans on sawed-off shotguns.

Some of these disputes are likely to be fought in legislative bodies. Speakers at the gun policy conference in Phoenix, for example, warned that a Democratic-controlled Congress might try to revive the federal ban on assault weapons that expired in 2004. But gun rights advocates stress that the Supreme Court decision changes the rules for legal challenges.

The Supreme Court "held very clearly that the Second Amendment protects an individual right," says Pratt. "That will now be the template that all other gun cases will have to use."

Should laws regarding concealed weapons be relaxed?

Long before the Sept. 11, 2001, terrorist attacks on the United States, Atlanta had been enforcing a statewide law banning firearms at what is now Hartsfield-Jackson International Airport. Now, a gun rights organization in Georgia is trying to use a new state

law legalizing possession of firearms in "public transportation" to permit airport visitors with a state firearms license to carry guns everywhere but in security zones.

"The city of Atlanta isn't obeying the state law," says John Monroe, the Atlanta attorney representing GeorgiaCarry.org and state Rep. Timothy Bearden, the freshman Republican legislator who sponsored the new law. The suit was filed July 1, the day the new law took effect.

City officials say the law does not apply to the airport and would be preempted by post-9/11 federal security measures if it did. U.S. District Judge Marvin Shoob agrees. The Atlanta airport — the busiest in the world — would be "less safe" if visitors could carry weapons, Shoob said on Aug. 11 in rejecting GeorgiaCarry's suit.⁶

Bearden, an NRA member and former police officer, touts the new law as the "biggest gun reform" in Georgia's history. The measure allows state firearm license holders to carry concealed weapons not only on transit system buses but also in state parks, state-owned buildings and most restaurants. Gov. Frank Perdue, a Republican, signed it into law on May 14 despite widespread calls from Democratic Atlanta Mayor Shirley Jackson and others to veto it.

Gun rights advocates are now citing the Supreme Court's *Heller* decision to help build on the gains they had already been making before the ruling to ease laws restricting concealed weapons in public places. "The Second Amendment recognizes a right not only to keep arms in the home but also to bear arms," says NRA attorney Halbrook.

Gun control advocates disagree. "There's nothing in that opinion that suggests that there's a right to carry guns on the street," says the Brady Center's Henigan. "It ought to be obvious that the implications of carrying a gun on the streets are different. There are a lot of risks to handguns.

Most States Support Gun Rights

At least 40 states have laws preempting any local gun regulations or constitutional provisions guaranteeing firearm rights. Only seven states require handgun registration.

Provision	No. of States
Firearm rights constitutional provision	44
State firearm preemption laws	47
State right-to-carry-concealed provision	40
License required to permit or purchase	
Handgun	17
Long gun	6
Registration required	
Handgun	7
Long gun	6
State waiting period required	
Handgun	10
Long gun	5
Record of sale reported to state/local government	17

Source: "Compendium of State Laws Governing Firearms: 2007," National Rifle Association/Institute for Legislative Action

Carrying them outside the home transports those risks."

The Supreme Court decision, in fact, notes that most 19th-century courts interpreting gun rights provisions in state constitutions upheld laws prohibiting the carrying of concealed weapons. In the next sentence, however, Scalia left the question somewhat open by giving tentative approval only to laws forbidding the carrying of weapons in "sensitive places such as schools and government buildings."

GeorgiaCarry cited the Second Amendment in its lawsuit challenging the Atlanta airport ban, but Halbrook discounts the likelihood of raising constitutional claims in such cases. "I don't think you're going to see challenges under *Heller* to bans on very specific places," he says.

Halbrook does argue, however, that *Heller* raises a potential constitutional claim for carrying concealed weapons in most public places. "Responsible,

trained persons — if they wish to do so — should have an entitlement to go through at least a registration process and carry guns for self-protection," he says.

"I don't think the populace would stand much for open carry," counters Horwitz of the anti-gun violence coalition. "It's awfully uncomfortable when people start carrying guns around." Still, Horwitz says the Supreme Court decision invites constitutional claims to carry firearms. "I don't think that's likely, but I really do think it's wide open," he says.

As the Georgia law illustrates, gun rights groups have been making gains on the issue in legislative bodies without having to go to court. Among its other provisions, the Georgia law also allows firearm license holders to bring guns to their jobs if stored in their cars. Florida also enacted a similar law this spring despite opposition from some employers who feared the measure would make workplaces less safe.

Speaking at the Second Amendment Foundation conference, Vice President Alan Gottlieb said gun rights advocates should press Congress to pass "a national concealed carry law so we will have the same rights that were given to law enforcement."

"The ultimate objective legislatively would be laws modeled after Vermont and Alaska, where there is specific recognition that people have a right to carry without any government involvement: no licenses, no permits," says Pratt of Gun Owners of America. "We keep trying to improve the situation so that people eventually have the same liberty that criminals do: carry without permits."

Meanwhile, the Atlanta airport suit prompted an Associated Press survey that found carrying firearms in the public areas of terminals is permitted at seven of the nation's busiest facilities. A spokesman for the federal Transportation Security Administration told the AP that the TSA has no position on guns at airports and no authority under federal law to ban them.⁷

Should criminal penalties for gun-related offenses be relaxed?

Randy Hayes was placed on probation after pleading guilty to battery in 1994 to settle a domestic violence complaint by his wife Mary Ann during a contentious divorce. Ten years later, Hayes found himself facing another domestic violence charge when Mary Ann called the Marion County, W. Va., sheriff's department after a dispute over his rights of visitation with their son.

Hayes might have resolved the new charge with another, similar plea and gotten the same kind of judicial tap on the wrist, except that a deputy sheriff found a rifle under Hayes' bed. That put Hayes in violation of a 1996 federal law — punishable by up to 10 years in prison — prohibiting possession of a firearm by anyone convicted of a crime of domestic violence.

Continued on p. 898

D.C. Still Trying to Finesse Handgun Ban Revision

Gun ownership "is an individual right they have to respect," gun rights lawyer says.

The District of Columbia faces the threat of renewed legal challenges as it works on a third rewrite of the district's 32-year-old handgun ban.

The D.C. council enacted a minimal rewrite of the ban on June 15, less than three weeks after the Supreme Court found the measure in violation of the Second Amendment's individual right to keep and bear arms. The council approved a broader revision on Sept. 16 to try to fend off a bipartisan effort in Congress to repeal the district's gun registration law altogether.

Now the council is working on permanent legislation to replace the "emergency" measure enacted in September and due to expire after 90 days. It was aimed at satisfying gun rights advocates by permitting registration of semiautomatic pistols and easing "safe-storage" requirements for pistols in the home.¹

Despite the changes, Alan Gura, the victorious lawyer in the gun-ban case, says the interim Sept. 16 measure still does not comply with the Second Amendment. "There are still some problems," says Gura. "I think the council will either fix the problems, or they will have the problems fixed for them."

D.C. Mayor Adrian Fenty and Police Chief Cathy L. Lanier both promised immediately after the Supreme Court ruling to try to maintain the strictest possible handgun regulations while complying with the decision. The legislation approved by the 13-member council on June 15 closely tracked the Supreme Court's holding by creating a limited exception to the ban for the use of a handgun for self-defense in the home. It preserved the existing ban on possession of semiautomatic firearms by continuing to define them as prohibited machine guns.

The law — like the later 90-day emergency measure — also relaxed by as little as possible the previous requirement that firearms stored in the home be disassembled or equipped with a trigger-lock. As approved, the June 15 law lifted the requirement only when a firearm was being used against a "reasonably perceived threat of immediate harm."

At the same time, Chief Lanier issued somewhat restrictive regulations for registering handguns, which required applicants to take a written examination and submit to a criminal background check. For new purchases, an applicant had to complete the registration process before obtaining the weapon from a licensed dealer within Washington. Applicants could register only one handgun.

Gun rights advocates sneered at the council's minimal changes. "It took them some time to understand," Gura says. When Con-

gress returned to Washington in September after a break for the Democratic and Republican national conventions, lawmakers from both parties pushed for a vote on a bill in the House of Representatives to repeal the district's ban on semiautomatic firearms and to repeal the registration process. Under the district's limited home rule, Congress can exercise its constitutional authority over the nation's capital by enacting legislation for the district or disapproving legislation approved by the council.

The council approved a second rewrite of the law on Sept. 16, the same day the House was to take up the over-

ride measure. Under the new version, the definition of machine gun was revised to eliminate semiautomatic weapons, applicants were permitted to register one pistol per month and the safe-storage rules were made advisory instead of mandatory. A new "child access provision," however, required that firearms be securely stored to prevent access by minors under age 16. Violators can be subject to a 180-day jail term and \$1,000 fine or — if injury or death results to the child or anyone else — a five-year prison term and up to a \$5,000 fine.²

Despite the council vote, the House approved the override measure in a post-midnight vote by a 266-152 margin, with 180 Republicans and 86 Democrats voting for it. D.C. Delegate Eleanor Holmes

Norton — who has no vote on the House floor — strenuously opposed the measure as an infringement of home rule. Even as the House voted, however, it was widely assumed that senators friendly to the district would block a vote in the Senate.

Acting D.C. Attorney General Pete Nickles said the September measure should satisfy both the court and Congress. "Any legitimate concerns by Congress on district gun laws should be satisfied by the new laws," he said.

The council's Judiciary Committee held hearings on permanent legislation on Oct. 10 with an eye to a council vote on the matter in November. Gura is still wary. "The city council needs to accept that they lost, that this is an individual right that they have to respect and that failure to do so will lead to more adverse litigation consequences," he says.



Washington Police Chief Kathy L. Lanier.

Metropolitan Police Department

¹ For recent coverage, see Mary Beth Sheridan, "Limit on Gun Law Passes; Senate Vote Unlikely," *The Washington Post*, Sept. 18, 2008, p. B2; Paul Duggan and Mary Beth Sheridan, "U.S. House, D.C. Council Wrestle Over Gun Control," *ibid.*, Sept. 17, 2008, p. A1.

² The legislation can be found on the district's Web site, http://dc.gov/mayor/pdf/showpdf.asp?pdfName=Second_Firearms_Control_Emergency_Amendment_Act_of_2008_Final.pdf.

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The provision — known as the Lautenberg Amendment, after its principal Senate sponsor, Sen. Frank Lautenberg, D-N.J. — is one of many gun-related penalties embedded in federal criminal law. Gun rights advocates helped persuade Congress to enact those provisions. “It was a way of conservatives simultaneously saying we respect gun rights, but we also want to do something about gun violence,” says Florida State’s Kleck.

Now, criminal defense lawyers across the country are citing the Supreme Court’s gun-rights decision in efforts to nullify convictions or enhanced sentences under some of these provisions. In particular, defense lawyers are arguing that so-called felon-in-possession convictions may infringe an ex-offender’s Second Amendment right to self-defense in his or her home.⁸

So far, federal judges are rejecting those arguments. But a leading expert on federal sentencing law says the courts are not giving the arguments sufficient consideration. “*Heller* at the very least can and should be read as the vindication of those subject to harsh sanctions for gun possession to raise new constitutional questions to get around them,” says Ohio State University’s Berman, publisher of a blog on sentencing issues.⁹

Gun control advocates note that Scalia’s majority opinion cited laws prohibiting possession of firearms by felons as presumptively valid even after the ruling. “The decision is very clear that criminal felons don’t have Second Amendment rights,” says Horwitz of the anti-gun violence coalition. “I don’t think that’s going to be a big change.”

“It’s ironic to see *Heller* being used in this way,” adds the Brady Center’s Henigan, “because it’s a consistent theme of the gun lobby that the solution to gun violence is more aggressive penalties for gun violators.”

The NRA’s Halbrook emphasizes the group’s support for stiff sentences for

crimes committed with guns. “The NRA’s focus always has been in favor of stern laws on criminals who use guns,” he says. But he also says some federal provisions are overbroad.

Felon-in-possession laws are “safe and secure,” Halbrook says, “with one condition: There are too many felonies and an increasing number of felonies being created by law.” He notes that the federal felon-in-possession law exempts persons convicted of antitrust violations, unfair trade practices or other business-related offenses.

For his part, Gun Owners’ Executive Director Pratt says the group generally opposes the felon-in-possession charge and specifically favors repealing the Lautenberg domestic-violence provision. “Under the Lautenberg ban, people who have committed very minor offenses that include pushing, shoving or, in some cases, merely yelling at a family member can no longer own a firearm for self-defense,” the group says on its Web site. “The Lautenberg gun ban should be repealed, not expanded.”

The Supreme Court is set to consider a limited challenge to expansive enforcement of the Lautenberg Amendment on Nov. 10 when it considers Hayes’ appeal of his felon-in-possession conviction. Charleston attorney Troy Giatris is arguing that Hayes’ 1994 battery conviction was not domestic violence because the charge did not specifically include that element.

The 4th U.S. Circuit Court of Appeals agreed and threw out Hayes’ felon-in-possession conviction in April 2007. The government asked the justices to review the decision, which it says conflicts with other federal appeals court rulings.

The government contends that limiting the Lautenberg Amendment to convictions for “domestic-violence specific laws” would “unnaturally” limit the scope of the provision. Giatris says he approves of the law but that it must be applied strictly. “Keeping guns out of the hands of lawbreakers is a good

thing,” he says, “but let’s very clearly define who the lawbreakers are.”

In a supporting brief filed on behalf of the Second Amendment Foundation, Gura, the winning lawyer in the *Heller* case, argues that defendants subject to gun-possession restrictions should at least be advised about the potential loss of Second Amendment rights before entering guilty pleas. On his blog, Professor Berman suggests that defendants arrested on the basis of guns found in home searches should consider raising Second Amendment claims.

Federal courts have proved unresponsive to such claims so far, according to Berman, citing Scalia’s apparent endorsement of gun-rights restrictions on felons. “Unless and until lower courts are willing to rethink some pre-*Heller* precedents, it’s not surprising that these defendants are not having much success so far,” he says. ■

BACKGROUND

Rewriting History

The Supreme Court’s decision to strike down the Washington, D.C., gun ban adopts what had been a non-mainstream view of the role of gun rights in England, colonial America and the United States. In this once minority viewpoint, the right to own and possess firearms was established in England and then embedded in the U.S. Constitution as an important bulwark of individual liberty, not only as protection for state militias. Gun bans, in this view, can amount to instruments of government oppression instead of domestic security.¹⁰

In Justice Scalia’s telling of the history in the court’s majority opinion, the Second Amendment derives from the

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Chronology

Before 1960

Second Amendment, ratified in 1791, establishes “right to keep and bear arms”; some view guarantee as individual right, others as collective right tied to “well-regulated militia.”

1939

Supreme Court upholds National Firearms Act, rules Second Amendment applies to weapons with “reasonable relationship” to militias.

1960s ***Assassinations, crime surge prompt federal gun control law.***

1968

Gun Control Act of 1968 enacted after Martin Luther King Jr., Robert F. Kennedy killings; law bars interstate gun sales and sales to criminals, “mental defectives,” others.

1970s ***Lines harden in debates over gun regulations.***

1974

National Council to Control Handguns founded; later changes name to Handgun Control.

1976

Washington, D.C., bans registration of new handguns; ban survives two court challenges.

1977

National Rifle Association (NRA) leadership replaced by hard-line opponents of gun regulations.

1980s ***Federal gun law eased; liberal law professor calls for re-examining Second Amendment.***

1981

White House press secretary Jim Brady seriously wounded, left partially disabled in attempted assassination of President Ronald Reagan; wife Sarah Brady becomes head of Handgun Control in 1985.

1986

Firearm Owners Protection Act eases ban on interstate gun sales; allows sales by licensed dealers away from principal place of business (“gun show loophole”); bans national firearms registry. . . . Armed Career Criminals Act provides for enhanced sentences for firearms possession by “prohibited persons,” such as felons.

1989

University of Texas law Professor Sanford Levinson calls for re-examining scope, meaning of right to keep and bear arms.

1990s ***Gun controls at federal level advance amid concern over mass shootings; many states pass right-to-carry laws.***

1990

Congress bans import of “assault weapons.”

1993

Brady Handgun Violence Prevention Act requires five-day waiting period for background check on handgun purchasers; waiting period lapses in 1998 with creation of instant background checks.

1996

Lautenberg Amendment extends federal “felon-in-possession” offense to include persons convicted of misdemeanor crime of “domestic violence.”

2000-Present

Bush administration backs individual right under Second Amendment; Supreme Court follows suit in striking down D.C. handgun ban.

2000

Republican George W. Bush elected president with endorsement from NRA; Democrat Al Gore is seen by some to have been hurt in critical states by support for gun control.

2001

Federal appeals court in Texas endorses individual right to arms under Second Amendment but finds no bar to prosecution under Lautenberg Amendment.

2002

Bush administration endorses individual right under Second Amendment but successfully urges Supreme Court not to review Texas case.

2003

Six Washingtonians challenge handgun ban; district court judge upholds law in 2004; federal appeals court strikes it down in 2007.

2008

Supreme Court strikes down D.C. gun ban, 5-4; city council rewrites law. . . . Gun rights advocates challenge bans in Chicago, suburbs; defendants cite ruling in efforts to reduce gun-related penalties.

Student Group Supports ‘Concealed Carry’ on Campus

Opponents call arming students “a terrible and dangerous idea.”

Texas State University student Michael Guzman remembers when he first heard there had been a shooting at Virginia Tech on April 16, 2007.

“I sort of dismissed it; I just thought, ‘Ah, another school shooting,’ ” recalls Guzman, a former Marine. “But the next day when I started reading about it, I realized the full extent of what had happened. It just hit me how desensitized my generation has become about such a horrific thing and how defenseless I would be if something like that happened at my school.”

So when Guzman heard about Students for Concealed Carry on Campus (SCCC), which was created the day after 32 students were killed at Virginia Tech, he joined immediately. Today the group claims more than 30,000 members on 200 college campuses; Guzman is the organization’s president.

SCCC advocates that students with concealed-carry permits be allowed to carry firearms on their college campuses and seeks to advance its position through academic discussion.

“We want people to realize that there is a basis in empirical evidence to support our cause,” Guzman said at the group’s first national conference last August in Washington, D.C. “We’re not just spouting inflamed rhetoric; there’s logic and thought to how we feel.”

But Brian Siebel, a senior attorney at the Brady Center to Prevent Gun Violence, calls arming students “a terrible and dangerous idea. College campuses are far safer than the rest of society. Why import the dangers of the outside society,

where concealed carry is legal and gun violence is prevalent, onto safe, gun-free zones?”

Siebel is co-author of “No Gun Left Behind,” a 2007 report arguing that college students’ often-risky behavior is reason enough to block their access to firearms. A vocal critic of SCCC, the Brady Center contends that more firearms on campus would bring risks that far outweigh the benefits of protection in the event of another school shooting.¹

SCCC argues that students should be able to defend themselves not only in a school shooting but also against the robberies and assaults that occur in and around college campuses. During protests held by the group in October 2007 and this past April, campus members across the country wore empty holsters to class for a week. Members are also asking their state and congressional lawmakers to support concealed carry on campus legislation.

Although no school has changed its rule since the organization has been formed, Liberty University in Lynchburg, Va., plans to consider the matter at its next Board of Trustees meeting in early March.

The SCCC is also working to change the law in Texas, where state lawmakers are considering proposed legislation that would change the current no-guns-on-campus law. The group is organizing witnesses and experts to testify at future hearings and has support from Republican Gov. Rick Perry.

Utah currently is the only state that requires public universities to allow concealed carry. Utah authorized the policy after

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conflict after the restoration of the English monarchy in 1661 between the Catholic kings Charles II and James II and their enemies in their predominantly Protestant adopted country. Charles and James sought to secure their power by using armed militias loyal to them while disarming Protestant militias.

James was overthrown in the Glorious Revolution of 1688, and his successors — his son-in-law William and daughter Mary — acceded to Parliament’s passage of the omnibus English Bill of Rights. As a guarantee against further disarmament, Parliament included this provision: “That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”

Scalia depicts the provision as securing in England an individual right to firearms. In the 18th century, King George III sought to deny that right to the American colonists by disarming many of the inhabitants in rebellious areas in the tumultuous decades leading up to the American Revolution. Scalia cites various revolutionary-era writings from the colonists to support the conclusion that the Second Amendment preserved a pre-existing right to keep and bear arms that was understood at the time as an individual right, unconnected to service in a militia.

Scalia relies heavily on the work of a pro-Second Amendment historian, Joyce Lee Malcolm, now a professor at George Mason University Law School

in Fairfax, Va. In his dissenting opinion, Justice Stevens cites the work of other legal historians — including Ohio State University’s Saul Cornell and George Washington University Professor Emeritus Lois Schworer — to argue that Scalia has the history wrong. The English Bill of Rights provision was — by its terms — neither universal nor unlimited, Stevens notes. And — after criticizing Scalia for giving “short shrift” to Congress’ deliberations on the Second Amendment — Stevens says that the prefatory Militia Clause reflects a “telling” decision by the draftsman, James Madison, to limit the amendment’s scope and reject more broadly phrased proposals submitted by dissenters from some of the state constitutional conventions.

the state Supreme Court struck down the University of Utah's on-campus gun ban in 2006.

SCCC hopes that a change in legislation in Texas will have a domino effect, just as in the 1980s when Florida's new concealed-carry law for residents spurred other states to adopt similar legislation.

Another student group, Students for Gun Free Schools (SGFS), was formed last summer in response to SCCC by the friends and family of a Virginia Tech victim. The group's report, "Why Our Campuses are Safer Without Concealed Handguns," is available online.²

Congress, meanwhile, passed a law in December 2007 in response to the Virginia Tech shootings by seeking to improve background checks to prevent adjudicated mentally ill persons from purchasing handguns.

"This bill will make America safer without affecting the rights of a single law-abiding citizen," said the Senate's chief sponsor, New York Democrat Charles E. Schumer.

Rep. Carolyn McCarthy, D-N.Y., whose husband was killed by a gunman on the Long Island Railroad in New York, said, "To me, this is the best Christmas present I could ever receive."



Students grieve following the April 2007 shootings at Virginia Tech. Student Seung-Hui Cho killed 32 people and wounded many others before committing suicide.

Getty Images/Scott Olson

Although the bill won rare support from both the Brady Campaign to Prevent Gun Violence and the National Rifle Association, other groups said that in forging compromise with the gun lobby, the bill's authors unintentionally imposed an unnecessary burden on government agencies by enabling thousands of people to buy guns.

"Rather than focusing on improving the current laws prohibiting people with certain mental health disabilities from buying guns, the bill is now nothing more than a gun lobby wish list," said Kristen Rand, legislative director of the Violence Policy Center. "It will waste millions of taxpayer dollars restoring the gun privileges of persons previously determined to present a danger to themselves or others."³

— **Vyomika Jairam**

¹ Allen Roston and Brian Siebel, "No Gun Left Behind — The Gun Lobby's Campaign to Push Guns into Colleges and Schools," Brady Center to Prevent Gun Violence, May 2007.

² "Why Our Campuses are Safer Without Concealed Handguns," Students for Gun Free Schools, www.studentsforgunfreeschools.org/SGFSWhyOurCampuses-Electronic.pdf.

³ Laurie Kellman, "Congress OKs Va Tech-Inspired Gun Bill," The Associated Press, Dec. 20, 2007.

Scalia views comparable right-to-bear-arms provisions included in early state constitutions and 19th-century judicial interpretations of them as "universally" supporting the individual rather than collective-right theory. He similarly treats the Supreme Court's two post-Civil War decisions touching on the Second Amendment as implicitly supporting an individual rights view; Stevens disagrees, saying the rulings merely declined to enforce the amendments against the states.

Whatever the legal import of the two decisions, Professor Gregg Lee Carter of Bryant University in Smithfield, R.I., notes that gun rights advocates point to both rulings as evidence of the unsavory motives behind limiting gun rights. In one, the court in

1876 found no basis for federal charges against members of an armed, white mob for massacring blacks who were defending an elected black official in Reconstruction-era Louisiana. In the other, the court in 1886 upheld the conviction of a German immigrant in Illinois for organizing an unauthorized militia aimed at protecting workers' right to unionize.¹¹

Gun rights advocates view as similarly tainted the first 20th-century gun law: New York's Sullivan Law, the 1911 statute still on the books that requires a license to buy or carry a handgun. Gun rights advocates view the law not as an anti-crime measure but a xenophobic effort to keep weapons out of the hands of Italian immigrants.

Congress passed the first federal gun laws in the 1930s. The National Firearms Act of 1934 required registration by sellers or owners of "gangster-type" weapons such as sawed-off shotguns. The Federal Firearms Act of 1938 required a federal license for dealers in all weapons and ammunition; sales to convicted felons were prohibited.

One year later, the Supreme Court in *United States v. Miller* (1939) upheld convictions under the 1934 law for possession of unregistered sawed-off shotguns. Scalia and Stevens disagree on the meaning of the ruling. Stevens says the court held that the Second Amendment applies only to weapons with "some reasonable relationship" to a militia. But Scalia says

the court's limited discussion of the amendment does not refute an individual right. Instead, he says, the ruling "stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." ¹²

Drawing Lines

Battle lines formed between gun rights and gun control groups beginning in the 1960s and hardened through the rest of the 20th century. The sharp divisions first emerged as Congress considered and eventually enacted a tough, federal gun control law in response to the assassinations and the urban crime and unrest of the 1960s. They hardened in the 1970s with the birth of the handgun control movement and the takeover of the National Rifle Association by hard-line opponents of gun regulations. Gun owners gained ground in Washington in the 1980s and continued to make progress in the states in the 1990s, even as gun control advocates were winning some significant victories in Congress.

Lee Harvey Oswald's use of a mail-order rifle to assassinate President John F. Kennedy in Dallas on Nov. 22, 1963, prompted calls for a federal gun law that bore fruit five years later in the wake of public outrage over the shooting deaths of two other national leaders: the Rev. Martin Luther King Jr. and Sen. Robert F. Kennedy, D-N.Y. The Gun Control Act of 1968 banned mail-order sale of guns. It also prohibited the interstate sale of

pistols or ammunition and of long guns unless contiguous states authorized such sales. In addition, the law imposed an outright ban on possession of guns by "prohibited persons," including felons, fugitives, alcoholics, drug users, "mental defectives" or juveniles. Congress, however, rejected President Lyndon B. Johnson's call for federal licensing and firearms registration.

The organized gun control movement that began to emerge in the 1970s owed its creation to two victims of gun violence. Mark Borinsky founded the National Council to Control Handguns in



Mom checks out a Glock at the National Rifle Association's annual meeting in Louisville, Ky., on May 16, 2008. The NRA has filed a package of suits challenging handgun bans in Chicago and several nearby suburbs.

Getty Images/Scott Olson

1974 after being robbed at gunpoint as a graduate student in Chicago. Pete Shields, a Republican businessman, joined the organization after his son's murder during San Francisco's so-called Zebra killings of 1973-1974 and eventually became its executive director and later chairman. It later changed its name to Handgun Control, Inc., and in 2001 to the Brady Campaign to Prevent Handgun Violence. It originally worked with but later separated from the harder-line National Coalition to Ban Handguns, now known as the Coalition to Stop Gun Violence.

On the opposite side, the National Rifle Association — originally formed in 1871 as a shooting association — had been actively opposing federal gun laws at least since the 1930s. The NRA leadership had angered many of its members, however, by endorsing some federal controls during deliberations on the 1968 law. NRA Executive Committee member Harlon Carter began urging a firmer stand against any gun controls in 1972. He gained support for his views thanks to editorials criticizing the NRA leadership in the association's own publication, *The American Rifleman*, and in editor Tartaro's magazine, *Gun Week*. The dispute came to a head in the so-called "Revolt at Cincinnati" at the NRA's annual meeting in 1977, which ousted the existing leadership and turned what Carter called "the new NRA" into a single-issue group denounced by critics as "the gun lobby."

Gun rights advocates gained some ground after the attempted assassination of President Ronald Reagan in 1981 but suffered significant setbacks during the rest of the decade. Most important, Congress eased federal gun restrictions with the Firearms Owners Protection Act of 1986 — also known as the McClure-Volkmer Act after its principal Senate and House sponsors. The law allowed interstate gun sales if the purchase is legal in the buyer's home state. It also created what critics call the "gun show loophole" by allowing licensed firearms dealers to sell guns away from their principal place of business. And it included a specific prohibition on creating a national gun registry. In line with the NRA's lobbying stance, Congress in the same year included provisions in the Armed Career

McCain and Obama Both Support Gun Rights

But NRA calls Obama “anti-gun.”

Democrat Barack Obama and Republican John McCain both endorse an individual right to possess guns under the Second Amendment — and so do their two national party platforms. Both presidential candidates also endorsed the Supreme Court’s June decision in the *Heller* case that struck down Washington, D.C.’s handgun ban.

Despite those parallels between the two candidates’ positions, the National Rifle Association is endorsing McCain while warning in more than \$2 million worth of advertising that Obama would be “the most anti-gun president in American history.”

From the opposite perspective, the Brady Campaign to Prevent Gun Violence is backing Obama, saying that he would make it “harder for dangerous people to get dangerous weapons” and complaining that McCain has “pandered to the gun lobby.”

The opposing groups’ interest in gun issues is not shared by the public at large. Guns barely register when voters are asked to identify major issues in the presidential campaign. Among 15 issues specifically listed in a CNN poll of voters in June 2008, guns ranked 12th among those who listed it as “extremely important.” In nearly two years of campaigning, Obama and McCain have given the issue only passing attention and are giving it even less attention in the final weeks of a race now concentrated almost solely on economic issues.¹

Gun rights advocates complain of the lack of attention. “Do you realize we’ve gone through all three presidential debates, and not one moderator asked a question about the Second Amendment or the *Heller* case?” NRA Executive Vice President/CEO Wayne LaPierre asks on the group’s Web site.

LaPierre notes that McCain but not Obama signed a brief submitted by 54 senators in the *Heller* case urging the Supreme Court to strike down the Washington, D.C., gun ban. After the

decision, McCain called the ruling “a landmark victory.” Obama said he had “always” believed in an individual right under the Second Amendment but also voiced support for “commonsense, effective safety measures.”

The Democrats’ platform, adopted in August, promises to “preserve Americans’ continued Second Amendment right to own and use firearms.” But it also calls for reinstating the federal ban on so-called assault weapons, improving federal background checks for gun purchasers and closing the “gun show loophole” permitting sales between individuals without a background check.

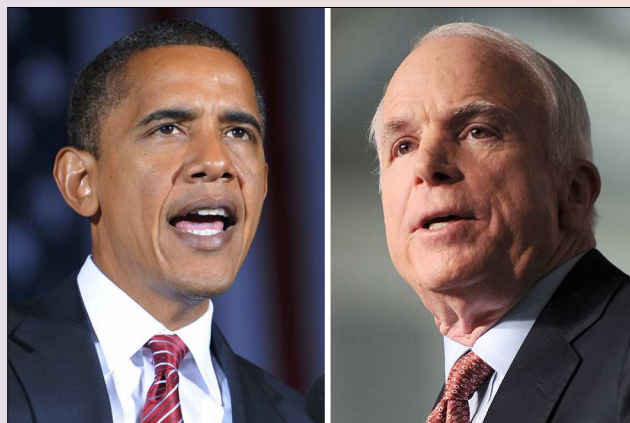
The Republican platform, approved in September, promises to “uphold the right of individual Americans to own firearms.” It goes on to oppose federal licensing or national gun registration and to condemn “frivolous lawsuits” against gun manufacturers. It says gun control “only . . . penalizes law-abiding citizens” and is “ineffective at reducing violent crime.”

As senators, McCain supported and Obama opposed a measure to shield gun makers from liability suits. McCain opposed the assault

weapon ban adopted in 1994 but did vote for background checks. As a state senator in Illinois, Obama supported a ban on semiautomatic weapons.

McCain pleased gun rights advocates by speaking to the NRA convention in May and by picking Alaska Gov. Sarah Palin — an NRA member — as his vice presidential running mate. Obama antagonized gun owners with a remark at a private fund-raiser talking about “bitter” people who “cling” to guns and religion because of economic frustration.

¹ Some background drawn from Glen Johnson, “Gun control a gray issue between McCain, Obama,” *The Associated Press*, Oct. 15, 2008.



*Sens. Barack Obama, D-Ill., and John McCain, R-Ariz. both endorsed the Supreme Court’s *Heller* decision striking down the D.C. gun ban.*

AFP/Getty Images/Emmanuel Dunand (Obama)/Robin Beck (McCain)

Criminal Act to increase sentences for possession of firearms by “prohibited persons” under the 1968 act.

Gun control advocates rebounded with significant successes in Washington in the 1990s. The Jan. 17, 1989, killing of five schoolchildren in Stockton, Calif.,

by a man armed with a semiautomatic assault rifle spurred Congress the next year to ban the import of specified semiautomatic weapons designated as “assault weapons.” Three years later — with a Democratic president and Democratic-controlled Congress for the first time

since 1981 — the Brady Handgun Violence Prevention Act established a federal background check and five-day waiting period to purchase a handgun. The five-day wait lapsed with establishment of the National Instant Criminal Background Check System in 1998.

In the states, meanwhile, gun rights advocates had been pressing arguments that shooting sprees such as the Stockton killings could be prevented or minimized by liberalizing laws to allow carrying of weapons. Through the 1990s, a growing number of states passed right-to-carry laws.

Going to Court

Gun rights advocates had been emphasizing a supposed individual right under the Second Amendment throughout the political debates over gun regulations since the 1960s, but they failed to win any court rulings backing the argument. Gradually, however, they picked up support from unexpected quarters: first from a liberal law professor, then from two Supreme Court justices and finally in 2001 and 2002 from the federal government itself. By the time the Supreme Court considered the D.C. handgun ban in March 2008, the individual rights view seemed likely to carry the day — and the only question remained how far the justices would go in setting constitutional limits on gun regulation.

The expansion of the individualist view of the Second Amendment beyond the circle of gun owners and their political supporters can be dated to the publication of a law journal article by a well-known liberal professor in 1989. In “The Embarrassing Second Amendment,” Sanford Levinson, a professor at the University of Texas Law School, argued that gun control supporters like himself needed to acknowledge that the amendment did set some constraints on government regulation of guns. More than a decade later, the prominent liberal Harvard law Professor Laurence Tribe came to a similar conclusion and renounced his previous view of the amendment.¹³

Two conservative Supreme Court justices, Scalia and Clarence Thomas,

signaled their support for the individual rights view in the 1990s. Thomas called for considering the issue in a concurring opinion in the court’s 1997 decision striking down the Brady Act’s requirement that local law enforcement agencies conduct background checks on gun purchasers. Scalia explicitly adopted the individual rights view in a passage in his book published the same year, *A Matter of Interpretation*.¹⁴

The 2000 presidential election brought to the White House a Republican, George W. Bush, who had been endorsed by the NRA and who was seen by some political observers to have owed his victory to pro-gun rights voters in such states as Tennessee and West Virginia. The Bush administration proved to be supportive of gun rights positions, most significantly when Attorney General John Ashcroft issued a memorandum in 2001 specifically endorsing the individual rights view of the Second Amendment. In 2002, the government formally notified the Supreme Court of its change of position in a filing in a criminal case from Texas testing the constitutionality of the ban on gun possession by domestic-violence defendants.

The case, *United States v. Emerson*, resulted in the first federal appeals court decision to adopt the individual rights view. Timothy Emerson, a Texas physician, had challenged his prosecution for possessing a gun while under a domestic violence restraining order. In a lengthy opinion, the 5th U.S. Circuit Court of Appeals in 2001 said that the Second Amendment guaranteed an individual right to possess firearms but that the domestic-violence restriction passed constitutional muster. Emerson appealed to the Supreme Court, where the government echoed support for the individual rights view while urging the justices to allow Emerson’s case to go to trial. The court declined to hear the case.¹⁵

A clearer Second Amendment challenge emerged in 2003, when six Washington, D.C., residents took on the 1976 handgun ban. U.S. District Judge Emmet Sullivan upheld the law in 2004, citing the Supreme Court’s 1939 decision in *Miller*. In 2007, however, the D.C. Circuit Court of Appeals ruled the law unconstitutional in a 2-1 decision written by a prominent conservative judge. The Second Amendment “protects an individual right to keep and bear arms,” Laurence Silberman wrote, and the complete ban on handguns violated that right.

Washington officials appealed to the Supreme Court even while gun control advocates acknowledged the risk of an adverse ruling. The case attracted more than 60 friend-of-the-court briefs — with two-thirds of them calling for the law to be struck down. The Bush administration urged the justices to recognize an individual right but give D.C. a second chance to justify the law. The justices’ questions during the March 18, 2008, arguments, however, strongly indicated that the court’s five conservatives agreed with the individual rights view and saw the city’s ban as a clear violation of the right.

Scalia and Stevens dramatically summarized their respective opinions in the case as the court ended its term on June 26. Based on textual and historical analysis, Scalia said the Second Amendment established an individual right to possess firearms in the home for self-defense.

“It is not the role of this Court to pronounce the Second Amendment extinct,” Scalia said as he concluded. He stressed that other regulations could survive, including registration and licensing, limits on carrying weapons in “sensitive” places and categorical bans on possession by felons and the mentally ill.

Stevens countered that the ruling would force courts to second-guess decisions by elected officials about gun regulations. “This Court should stay out of this political thicket,” he warned. ■

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At Issue:

Will wider availability of handguns increase public safety?



GARY KLECK
PROFESSOR, COLLEGE OF CRIMINOLOGY
AND CRIMINAL JUSTICE,
FLORIDA STATE UNIVERSITY

WRITTEN FOR *CQ RESEARCHER*, OCTOBER 2008

it is unlikely that the Supreme Court's recent Second Amendment decision will noticeably affect national gun ownership rates, but it could increase levels in the handful of local areas that had previously banned handguns, such as Washington, D.C., and Chicago. It is therefore worth reviewing what the best evidence indicates about the likely effects of changes in gun availability.

No one is proposing to legalize the possession or acquisition of guns by convicted criminals, which is currently forbidden in every state. Thus, any weakening of legal restrictions on guns in the foreseeable future is likely to pertain only to those individuals not previously convicted of crimes.

This distinction is important because research has consistently indicated that gun possession and use has both violence-increasing and violence-decreasing effects, and that which of these effects dominates depends on whether the guns are possessed or used by criminals or non-criminals. Gun possession among non-criminals has overwhelmingly violence-reducing effects, while gun possession among criminals has mixed effects.

Research has unanimously indicated that defensive gun use is effective. Victims who use guns during crimes are less likely to be injured or lose property than those who use other resistance strategies or do not resist at all — and almost always without wounding or killing the criminal. Victim gun use does not provoke offenders into greater violence, nor does it result in offenders taking guns from victims and using them against the victims.

Gun ownership may also deter some criminals from even attempting some crimes in the first place, for fear of confronting an armed victim. Criminals interviewed in prison indicate they have at times refrained from committing crimes because they believed a potential victim might have a gun. Likewise, crime rates have dropped substantially after highly publicized instances of prospective victims arming themselves, being trained in gun use or using guns against criminals. Further, burglars in the United States are more careful to avoid residences where the victims are home than burglars in nations with lower gun ownership; burglaries against unoccupied homes cannot result in injury to the residents.

Gun availability among non-criminals tends to increase public safety. More guns among non-criminals does provide more guns for criminals to steal, and thus might increase criminal gun levels, but the statistically strongest research indicates that higher overall gun levels have either no net effect on violent-crime rates or mild crime-reducing effects.



PHILIP J. COOK
PROFESSOR OF PUBLIC POLICY,
DUKE UNIVERSITY
JENS LUDWIG
PROFESSOR OF SOCIAL SERVICE
ADMINISTRATION, LAW AND
PUBLIC POLICY,
UNIVERSITY OF CHICAGO

WRITTEN FOR *CQ RESEARCHER*, OCTOBER 2008

One of the most hotly contested issues in the larger debate on gun control is whether guns in a community have a positive or negative effect on crime. Now, as a result of the *Heller* decision, the issue may be tested, as gun regulations are challenged on Second Amendment grounds in one jurisdiction after another.

If gun regulations are relaxed and more residents of large, crime-prone cities acquire handguns for self-defense, the rates of assault, robbery, and rape will not be noticeably affected. What will be affected is the assailants' choice of weapon. An increase in gun ownership fuels the secondary market by which guns flow to youths and criminals through loans among family and friends, off-the-books sales and theft. Of course, gun prevalence may have other effects as well — if criminals are concerned about encountering an armed victim, they may desist (the “deterrence” argument). But theoretical arguments are not enough to resolve this issue.

Fortunately, the empirical evidence is very strong, thanks to the discovery of a new proxy for gun prevalence. It turns out that the percentage of suicides with guns is very highly correlated with household gun ownership rates, both across jurisdictions and over time. That discovery has opened the door for empirical research that was previously hamstrung by the lack of a good measure of local gun prevalence. Now we know with certainty that in areas where more households own guns, young men are more likely to carry guns, and more robberies and assaults are likely to involve guns. And that is not good news.

Increased gun use will result in a higher murder rate. When an assailant uses a gun instead of a knife or club, it greatly increases the chance that the victim will die. Guns do not cause violence, but they intensify violence. We have found, using long-term studies in large U.S. counties, that an increase in gun prevalence increases the gun murder rate but has no effect on the non-gun murder rate, so the net result is an increase in the overall murder rate. A 10 percent increase in gun prevalence results in a 1-3 percent increase in murders, all other things equal. We were able to rule out the possibility that this result reflects reverse causation, although we cannot be absolutely sure in the absence of randomized field experiments.

Sadly, the *Heller* decision may provide something akin to a grand experiment with increased gun prevalence.

Continued from p. 904

CURRENT SITUATION

Testing *Heller's* Reach

A decade-long legal battle over gun shows at the Alameda County Fairgrounds in California is emerging as the case likely to yield the first ruling on whether the newly recognized Second Amendment gun-possession right limits state and local gun regulations.

Gun show promoters Russell and Sallie Nordyke are citing the Supreme Court's decision in the District of Columbia gun ban case in their effort to invalidate a county ordinance that effectively bans gun shows at the fairgrounds by prohibiting guns on any county-owned property.

The Supreme Court's *Heller* decision applies only to Washington, D.C. — a federal jurisdiction — and leaves open the question whether the Second Amendment also applies to state and local governments. The Nordykes are asking the 9th U.S. Circuit Court of Appeals to rule that the Second Amendment should be "incorporated" against the states and then to strike down the county's ordinance as an unconstitutional local government restriction on gun possession rights.¹⁶

"The Founding Fathers believed that the right of self-defense was the premier

human right and that it included the right to possess arms for self-defense," says Don Kates, a longtime gun rights advocate who joined as co-counsel in the Nordykes' case on behalf of the Second Amendment Foundation. "Once you accept those premises, why would you not incorporate it?"

The county's lawyers, however, contend that the Second Amendment should not be enforced against the states under the Supreme Court's current approach to the incorporation doctrine because the right was not well established in English common law and is not regarded as fundamental in the states today.

challenges to local gun bans filed immediately after the Supreme Court's decision on June 26. A federal judge in Chicago is in the early stages of presiding over three consolidated suits — two challenging Chicago's handgun ban and a separate suit against a similar ban in suburban Oak Park.

The NRA originally included San Francisco in a suit challenging a handgun ban imposed by the San Francisco Housing Authority. Because the city has been dismissed from the suit, the Second Amendment incorporation issue dropped out.¹⁷

Alameda County banned guns on county-owned property a year after a gang-related shootout at the fairgrounds in Pleasanton on July 4, 1998. Nine people were wounded and seven others injured from a resulting stampede.

The ordinance was sponsored by County Supervisor Mary King, who had earlier introduced a measure specifically banning gun shows at the fairgrounds. After the ordinance was enacted, Sallie Nordyke, owner with her husband Russell of T.S. Trade Shows, said the measure would likely put them out of business if followed by other counties.

Today, Alameda County Counsel Richard Winnie defends the ordinance as a public safety measure not only for the fairgrounds but also for many other county-owned facilities. "The county government deals with social welfare issues, a lot of places where there are conflicts," Winnie says. "It's very important to make sure the public feels safe, and guns are a situation where people feel endangered."

The Nordykes' case has wound its way through both federal and state



Two men wearing guns stop for lunch in Vermillion, Ohio, in December 2003 during a demonstration in support of legislation permitting concealed weapons in the state. That law was passed in 2004. A new Ohio law that took effect on Sept. 8, 2008, follows passage of the 2004 law and a 2006 measure preempting local gun regulations.

AP Photo/John Kuntz

"States are all over the map in the degree to which they regulate firearm use," says Peter Pierce, a Los Angeles attorney handling the Second Amendment aspect of the case for the county. "So it's very difficult to say that there's any degree of uniformity in the states."

The long history of the Nordykes' suit makes it more likely to yield an early ruling on applying the Second Amendment to the states than the

courts. The 9th Circuit rejected the Nordykes' claim that the ordinance violated their free speech rights to promote the use and sale of guns. The federal court also rejected a Second Amendment claim on the strength of a prior 9th Circuit ruling, but two judges criticized the earlier decision. On a referral from the 9th Circuit, the California Supreme Court also rejected the Nordykes' argument that state law preempted the county's ordinance.

Both sides have now filed new briefs discussing the *Heller* case. The three-judge 9th Circuit panel has yet to schedule arguments.

Even if the Second Amendment is held applicable to the states, one expert predicts most state and local government regulations will still be upheld. "You're not going to see a major revolution," says Ohio State history Professor Cornell. "You can't have wholesale bans on handguns. Almost anything else that can survive the political process is going to pass constitutional muster."

Gaining in the States

Ohio gun rights advocates are resting on their accomplishments after winning enactment of a new law — signed by Democratic Gov. Ted Strickland — that further eases state gun regulations.

The new law, which took effect Sept. 8, follows two other major victories in the past four years: a 2004 law permitting carrying of concealed weapons and a 2006 measure preempting any local gun regulations. The preemption measure took effect in March 2007 after the Ohio General Assembly had overridden a veto by Republican Gov. Robert Taft.

"The past 18 months have been the best there have ever been," says Ken Hanson, an attorney who is legislative chair for the Buckeye Firearms Association. Hanson says the group has no

current legislative agenda at the state level, pleading "fatigue" after "years and years" of fighting.

The state's lone, prominent gun control lobbyist concedes that gun rights forces gained the upper hand with passage of the concealed carry law in 2004 and have been picking up additional victories since then.

"They nitpick at it, and it goes downhill from there," says Toby Hoover, executive director of the Ohio Coalition Against Gun Violence. "The reality is that they don't want any regulation."

Ohio was relatively late in passage of concealed-carry and preemption legislation, but the two laws are emblematic of the successes that gun rights advocates have won at the state level. The NRA counts 47 states with laws preempting local gun regulations: all but Hawaii, Illinois and Nevada. It counts 40 states as having "right to carry" laws — 11 of those enacted since 2000. (*See chart, p. 896.*)

Laws differ from state to state. Ohio's law preempts localities from banning guns in public parks, according to a 4-3 ruling by the state's Supreme Court in September. By contrast, the California Supreme Court's 2002 ruling in the Alameda County fairgrounds case allows localities to ban guns on publicly owned property.

Ohio passed its concealed carry law in 2004 after what Hoover describes as a 10-year legislative struggle. "We didn't really have much good news before then," Hanson concedes.

The measure is typical of so-called shall-issue laws, which generally require authorities to issue permits to carry concealed handguns to any applicant meeting specified requirements. The Ohio law requires applicants to be at least 21 years of age, to have taken at least 12 hours of firearms training and to have demonstrated competency through written and shooting examinations. A criminal background check is required. No permits are to be issued to anyone convicted of a

felony, a drug offense or certain violent misdemeanors.

Taft signed the concealed-carry law. Two years later, he vetoed the preemption measure, citing home-rule concerns. The veto override was the first in Ohio in 28 years, according to Hanson.

Strickland, a Democrat from rural southeastern Ohio with what Hanson calls an "A-plus" rating on gun issues, signed the 2008 measure into law. It relaxes various restrictions on where concealed weapons can be carried and also denies landlords the right to prohibit guns on rented premises. In addition, the measure enacts a so-called "castle defense" provision, expanding the scope for using deadly force in self-defense in one's home or car.

Hanson, who lives just outside Columbus, attributes gun rights advocates' successes to a new political attitude toward gun issues among legislators in both parties. "The legislators started to realize the gun issue was nothing to lose and everything to gain," he says. "When [legislators] do vote pro-gun, they gain contributions and volunteers."

For her part, Hoover sees the issue as one that divides rural and urban lawmakers. "We have a lot of big cities," says Hoover, who lives in Toledo. "The rural areas don't really understand the crime problems in big cities. The legislature felt they had the right to tell the local governments that they had no right to govern on this issue, so they passed a preemption."

Gun rights advocates push for concealed-carry laws by pointing to a personal desire for self-defense, while gun control supporters warn they are likely to increase gun violence and accidents. Many experts concede the evidence is inconclusive. "Most of the research shows it doesn't make much of a difference one way or the other," says Harry Wilson, a professor of political science at Roanoke College in Virginia.

Gun rights advocates were already advancing in the states before the Supreme Court's decision in the *Heller*

case. One gun control advocate believes the court's decision may help gun rights supporters' cause despite the passage in the court's opinion signaling approval of many gun regulations.

"Most state legislators will hear a message that when it comes to gun controls, gun bans — the Supreme Court has said you can't go there," says Horwitz of the Coalition to Stop Gun Violence. ■

OUTLOOK

Missing the Bull's-Eye?

The Supreme Court's decision in the Washington, D.C., gun ban case may change the political and legal background on gun issues less than it might seem to portend after an initial reading. It recognizes an individual right under the Second Amendment already largely accepted by the American public and then quickly signals likely acceptance of a range of restrictions on the possession or carrying of firearms.

Despite the court's cautionary passage, gun rights advocates are hopeful that lower courts will rely on the decision to begin striking down other gun restrictions once — as they assume — the Second Amendment is held applicable to the states. "Judges have been told to get re-educated,"

says Gun Owners' Executive Director Pratt. "Read the doggone amendment and learn what the words mean."

From the opposite perspective, gun control supporters are saying that the decision could help aid their cause by eliminating the fear that restrictions could merely be a first step toward gun bans. "Over the long haul, it may make it more difficult for the gun lobby to frame the debate as a cultural debate," says the Brady Center's Henigan.

Outside experts, however, are discounting the likelihood of significant shifts, either legally or politically. "Everybody will continue to believe what they've always believed," says Florida State Professor Kleck. Roanoke College's Wilson agrees. "Five years from now, we'll be pretty much where we are today," he says.

"Things may loosen up a bit," Wilson adds. "We will have seen a couple more cases go up to the [Supreme] Court." But gun rights advocates, he says, "will be taking cases they're pretty certain they can win."

Gura, the winning lawyer in the D.C. gun ban case, expects messier litigation that over time will result in advances for gun rights. "We're going to see a number of frivolous and silly cases making bizarre Second Amendment claims that are not going to work," he says, citing, in particular, cases challenging felon-in-possession law. "But there are also going to be some cases that will advance and define the right to arms as practical and meaningful."

Skirmishes will continue in state legislatures, Wilson says, but they will be

fights "at the fringes." Nationally, the opposing interest groups have opposing agendas. Gun rights advocates imagine a national concealed carry law; gun control supporters put highest priority on closing the "gun show loophole."

A new Congress with what is widely predicted to be a bigger Democratic majority may be somewhat more receptive to gun control proposals. The new president — Obama or possibly even McCain — is unlikely to be as supportive of gun rights groups as the Bush administration has been.

Nevertheless, gun issues seem unlikely to rank high on the agenda for either the president or Congress after Inauguration Day, Jan. 20, 2009. The economy is still expected to be in distress, wars will be continuing in Iraq and Afghanistan and a plateful of other unattended issues — domestic and international — will be crying for attention.

Gun control advocates appear to be resting their hopes on Democrats controlling both ends of Pennsylvania Avenue. "With a change in administration and a change in Congress, you may very well have a change of momentum for stronger gun laws, just as we had during the Clinton administration," says Henigan.

"It remains the case that the vast majority of the American people support stronger gun laws," he says. "The vast majority of gun owners support stronger gun laws."

But Wilson doubts that Democrats will see a political advantage in taking on the issue. "The Democrats don't want to touch this with a 10-foot pole," he says.

Meanwhile, the NRA's Halbrook scoffs at gun control supporters' hope for a coming-together on gun issues. "There's going to be continued controversy," he says. "Those who wish to restrict or ban handguns — now they're going to say everything is reasonable. It's the same stuff, basically."

"Each side sees it as a slippery slope," says E. Stewart Moritz, an associate professor at Akron University School of



About the Author

Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and editor of *The Supreme Court from A to Z* (both CQ Press). He was a member of the *CQ Researcher* team that won the American Bar Association's 2002 Silver Gavel Award. His previous reports include "Gun Violence" and "Gun Control Standoff."

Law in Ohio, who teaches a course on firearms regulation. "Because of that, every inch of ground is so hard-fought. They don't know how to stop." ■

Notes

¹ Reporting in Phoenix by freelance journalist Noble Sprayberry.

² The decision is *District of Columbia v. Heller* 554 U.S. — (2008), www.supremecourtus.gov/opinions/07pdf/07-290.pdf. For a detailed account, see Kenneth Jost, "Second Amendment Confers Individual Right to Firearms," *The Supreme Court Yearbook 2007-2008* (forthcoming November 2008). For previous coverage, see these *CQ Researcher* reports: Bob Adams, "Gun Control Debate," Nov. 12, 2004, pp. 949-972; Kenneth Jost, "Gun Control Stand-off," Dec. 19, 1997, pp. 1105-1128; Richard L. Worsnop, "Gun Control," June 10, 1994, pp. 505-528.

³ For background, see Kenneth Jost, "Gun Violence," *CQ Researcher*, May 25, 2007, pp. 457-480.

⁴ The case, *McDonald v. City of Chicago*, 1:2008cv03645, is pending before U.S. District Court Judge Milton Shadur.

⁵ See Deborah Horan, "Under fire, suburbs vote down gun bans," *Chicago Tribune*, Aug. 12, 2008, p. 1.

⁶ The case is *GeorgiaCarry.Org, Inc. v. City of Atlanta*, 1:08:CV-2171-MHS (U.S. Dist. Ct. N.D. Ga.). For documents, see www.georgiacarry.org or www.asherfuse.com, the Web site of the private law firm defending the city in the case. For coverage, see Bill Rankin, "Ban on guns at airport to stay," *Atlanta Journal-Constitution*, Aug. 12, 2008, p. 1A. ShooB's formal order dismissing the complaint on Sept. 26 is now being appealed to the 11th U.S. Circuit Court of Appeals.

⁷ Shannon McCaffrey, "In many US airports, guns are OK outside security," *The Associated Press*, Oct. 15, 2008. The list includes Dallas/Fort Worth, Detroit, Los Angeles, Minneapolis/St. Paul, Philadelphia, Phoenix and San Francisco.

⁸ For early coverage, see Mark Sherman, "Guns ruling spawns legal challenges by felons," *The Associated Press*, July 19, 2008.

⁹ "Sentencing Law and Policy," http://sentencing.typepad.com/sentencing_law_and_policy/. The blog includes a number of *Heller*-

FOR MORE INFORMATION

Brady Campaign to Prevent Gun Violence, 1225 I St., N.W., Suite 1100, Washington, DC 20005; (202) 289-7319; www.bradycenter.org. Political action committee dedicated to ending gun violence without banning all guns; the Brady Center to Prevent Gun Violence (same address) is the organization's affiliated non-partisan policy arm.

Centers for Disease Control and Prevention, 1600 Clifton Rd., Atlanta, GA 30333; 1-800-232-4636; www.cdc.gov. Agency of the U.S. Department of Health and Human Services that works to protect public health and safety by providing information to help enhance health decisions; maintains statistics on deaths and injuries resulting from firearm use.

Coalition to Stop Gun Violence, 1023 15th St., N.W., Suite 301, Washington, DC 20005; (202) 408-0061; www.csgv.org. Coalition of 45 national organizations — including religious organizations, child welfare advocates and public health professionals — pushing a progressive agenda to reduce firearms death and injury.

Gun Owners of America, 8001 Forbes Place, Suite 102, Springfield, VA 22151; (703) 321-8585; www.gunowners.org. Nonprofit lobbying organization defending Second Amendment rights of gun owners.

National Rifle Association, 11250 Waples Mill Rd., Fairfax, VA 22030; 1-800-672-3888; www.nra.org. Promotes the safety, education and responsibility of gun ownership and the rights of Americans under the Second Amendment to own and carry guns.

Second Amendment Foundation, 12500 N.E. 10th Place, Bellevue, WA 98005; (425) 454-7012; www.saf.org. Educational and legal policy center dedicated to promoting a better understanding of Americans' constitutional rights under the Second Amendment to possess firearms.

related entries, some of them compiled from a separate blog, "The Volokh Conspiracy," published by UCLA law Professor Eugene Volokh (www.volokh.com).

¹⁰ Background drawn in part from narrative chronology in Gregg Lee Carter, *Gun Control in the United States: A Reference Handbook* (2006). On the English history, from an individual rights perspective, see Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994); on American history, from a "civic participation" perspective, see Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control* (2006).

¹¹ See Carter, *op. cit.*, pp. 128-129. The decisions are *United States v. Cruikshank*, 92 U.S. 542 (1876) and *Presser v. Illinois*, 116 U.S. 252 (1886).

¹² The decision is *Miller v. United States*, 307 U.S. 174 (1939).

¹³ For an overview, see Adam Liptak, "A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal Judiciary," *The New York Times*, May 7, 2007, p. A1. Levin-

son's article, originally published in *Yale Law Journal*, Vol. 99, pp. 637-659 (1989), can be found online on a number of pro-gun rights Web sites.

¹⁴ See *Printz v. United States*, 521 U.S. 898, 936 (1997); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997), pp. 136-137.

¹⁵ The case is *United States v. Emerson*, 270 F.3d 303 (5th Cir. 2001). For coverage, see Linda Greenhouse, "Justices Reject Case on Right to Bear Arms," *The New York Times*, June 11, 2002, p. A24.

¹⁶ The case is *Nordyke v. King*, Civ. 07-15673 (9th Cir.); documents can be found on Hoffmanmag.com, a blog published by a pro-gun rights businessman, Gene Hoffman Jr. (www.hoffmanmag.com/firearms/Nordyke-v-King). For coverage, see Bob Egelko, "Gun show promoters may appeal weapons ban at fairsgrounds," *San Francisco Chronicle*, April 20, 2007, p. B2.

¹⁷ For a wrap-up, see Judy Keen, "NRA suits push cities to drop gun bans," *USA Today*, Sept. 11, 2008, p. 3A.

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The comprehensive reference work opens with expository chapters on the social and political landscape of gun control and the practical operation of gun regulations. Carter chairs the Department of History and Social Sciences at Bryant University in Rhode Island. Includes detailed chronology, federal and state laws, organization list and other reference materials.

Cornell, Saul, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, Oxford University Press, 2006.

A professor of history at Ohio State University examines the debates in the United States over the right to be armed from the Revolutionary era and the writing of the Second Amendment through the 19th century. Cornell believes neither side in contemporary gun rights debates is “faithful to the original understanding” of the amendment. Includes detailed notes.

Jacobs, James B., *Can Gun Control Work?* Oxford University Press, 2002.

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Malcolm, Joyce Lee, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, Harvard University Press, 1994.

Malcolm, now a professor at George Mason University School of Law, traces the right to be armed from its origins in 17th-century England through the writing of the Second Amendment. Malcolm says the right “has not worn well” in either England or the United States. Includes detailed notes. Malcolm’s more recent work, *Guns and Violence: The English Experience* (Harvard University Press, 2002), closes with two chapters analyzing and proposing a resolution of the gun control debate in the United States.

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A professor of political science at the State University of New York-Cortland provides a comprehensive overview of gun control issues with new material on, among other things, state right-to-carry and “shoot-first” self-defense laws. Includes chapter notes.

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A professor of public affairs at Roanoke College tries to provide a balanced account of the political and policy debate over gun control. Wilson ends up taking the gun rights perspective but criticizes “scare tactics” by gun rights advocates and gun control groups alike. Includes chapter notes, 16-page list of works cited.

Reports and Studies

“The Second Amendment and the Right to Bear Arms After *DC v. Heller*,” *UCLA Law Review*, Vol. 56, No. 5 (forthcoming, June 2009).

A symposium scheduled for Jan. 23, 2009, at the University of California-Los Angeles Law School will include invited papers from a range of leading experts and advocates representing all sides of the gun rights debate.

“Unintended Consequences: What the Supreme Court’s Second Amendment Decision in *D.C. v. Heller* Means for the Future of Gun Laws,” Brady Center to Prevent Gun Violence, Oct. 20, 2008, www.bradycenter.org/xshare/pdf/heller/post-heller-white-paper.pdf.

The 17-page “white paper” argues that the Supreme Court’s decision in the D.C. gun ban case may aid efforts to enact and enforce “reasonable” gun laws by alleviating fears of broader gun bans. Gun rights organizations such as the National Rifle Association, Gun Owners of America and Second Amendment Foundation have not produced comparable overviews of the impact of the *Heller* decision but do provide various analyses and commentaries on their Web sites.

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The conservative former chief judge of the 4th U.S. Circuit Court of Appeals accuses the Supreme Court of “a failure to adhere to a conservative methodology” in the *Heller* decision. Wilkinson’s article drew many comments on legal blogs, including criticism on such conservative blogs as *National Review Online* (<http://bench.nationalreview.com/>) and the Volokh Conspiracy (www.volokh.com).

The Next Step:

Additional Articles from Current Periodicals

Concealed Weapons

“Ball State group wants gun rights on campus,” *The Associated Press*, Oct. 20, 2008.

Several students at Ball State University in Indiana want permission to carry concealed weapons on campus.

“Colleges to fight concealed gun bill,” *The Associated Press*, Oct. 14, 2008.

Most Ohio university and college heads vow to fight efforts to allow students to carry concealed weapons on campus.

Cook, Rhonda, “Right to Carry Case,” *Atlanta Journal-Constitution*, Sept. 28, 2008, p. 1D.

A suit to allow citizens to carry firearms in Atlanta’s Hartsfield-Jackson International Airport was struck down.

Santana, Norberto Jr., and Natalya Shulyakovskata, “Sheriff defends weapon rules; Four supervisors question her tougher policies on granting concealed-gun permits,” *Orange County Register*, Oct. 8, 2008, p. B1.

Sheriff Sandra Hutchens of Orange County, Calif., will not issue concealed weapons permits even though her predecessor offered them to campaign contributors.

District of Columbia v. Heller

Liptak, Adam, “Ruling on Guns Elicits Rebuke From the Right,” *The New York Times*, Oct. 21, 2008, p. A15.

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Nakamura, Dave, “D.C. Crime-Fighting Plan Expands Anti-Gang Tools; Members Could Be Barred From Certain Areas Under Proposal,” *The Washington Post*, Oct. 4, 2008, p. B1.

D.C. Mayor Adrian Fenty has proposed revamping the city’s anti-crime strategy after the Supreme Court nullified D.C.’s gun ban.

Sherman, Mark, “Judge Wilkinson faults Scalia; 4th Circuit conservative: Supreme Court justice’s gun view is judicial activism,” *Richmond Times Dispatch* (Virginia), Sept. 28, 2008, p. A6.

A prominent, conservative appeals court judge compares Justice Antonin Scalia’s majority opinion to *Roe v. Wade*.

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The city of Philadelphia will not be allowed to create its own gun laws — including those involving the sale of firearms — despite strong support from the National Rifle Association (NRA).

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Lord, Rich, “Lawyer challenges city limits on gun sales,” *The Pittsburgh Post Gazette*, Oct. 13, 2008, p. B1.

A ban on selling guns in Pittsburgh has been challenged by the NRA and recently brought to court.

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“Opponents of gun violence back Obama for president,” *The Associated Press*, Oct. 13, 2008.

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The NRA has endorsed Republican candidate John McCain for president while the American Hunters and Shooters Association has endorsed Democratic candidate Barack Obama.

Moscoco, Eunice, and Chris Megerian, “NRA spends millions on election; much to defeat Obama,” *Cox News Service*, Oct. 17, 2008.

The NRA has spent more than \$10 million on the campaign in an effort to keep presidential candidate Barack Obama out of the White House.

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Jost, Kenneth. “Rethinking the Death Penalty.” *CQ Researcher* 16 Nov. 2001: 945-68.

APA STYLE

Jost, K. (2001, November 16). Rethinking the death penalty. *CQ Researcher*, 11, 945-968.

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Research Update

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Gun Rights Debates

Here are key events, legislation and court rulings since publication of the CQ Researcher report by Kenneth Jost, "Gun Rights Debates," Oct. 31, 2008.

In its second major gun-rights decision in two years, the U.S. Supreme Court ruled 5-4 on June 28 that the Second Amendment's guarantee of an individual right to bear arms applies to state and local gun-control statutes. The case is *McDonald v. Chicago*.

The court's similarly split 5-4 ruling two years earlier, in *District of Columbia v. Heller*, likewise affirmed gun owners' Second Amendment rights. But that decision only applied to federal laws.

Justice Samuel A. Alito Jr., writing the majority opinion in *McDonald*, concluded, "The Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."¹⁸

Gun-rights advocates saw the court's decision as a long-awaited vindication of the Second Amendment as a fundamental right for Americans to own firearms. "The Second Amendment," said Wayne LaPierre, executive director of the National Rifle Association, "is now a real part of American constitutional law." On the PBS "NewsHour," LaPierre vowed a vigorous effort to use the ruling to strike down state and local gun laws. "We're going to fight for the free-

dom in every city, town, state in the country," he said.¹⁹

Gun-control organizations acknowledged the likelihood of gun-rights challenges in court, but predicted courts would uphold many regulations. "There is nothing in today's decision that should prevent any state or local government from successfully defending, maintaining, or passing sensible, strong gun laws," said Paul Helmke, president of the Brady Campaign to Prevent Gun Violence.

In Chicago, Mayor Richard Daley said he was "disappointed" but not surprised by the ruling. "Gun violence is not just a Chicago problem, it is an American problem," Daley said. "And, it will continue until we understand that there are reasonable and responsible steps we can take as a nation to help end the needless gun violence that irresponsible people bring on our friends and family."

Otis McDonald, the plaintiff in the case, was exultant after the ruling. "Self-defense in America has been validated today," McDonald said from the Supreme Court plaza, having come to Washington to hear the ruling an-



Gun-rights advocates were cheered by two recent Supreme Court rulings, which overturned strict handgun bans in Chicago and Washington, D.C.

AFP/Getty Images/Gabriel Bouys

nounced. "Today the playing field will be level, and I don't have to be concerned about the gang bangers in my neighborhood. They will now think twice. And I hope others in my position will be safer."

The challenge to Chicago's 28-year-old handgun ban, which is similar to the D.C. handgun ban that was struck down in the 2008 decision, came from the Second Amendment Foundation, which filed the lawsuit on the same day the *Heller* decision was handed down. The NRA followed with a package of suits challenging the handgun



Getty Images/Brendan Hoffman

Otis McDonald, who successfully challenged Chicago's gun ban, speaks to the press after the Supreme Court's decision was announced on June 28, 2010.

ban in Chicago as well as bans in several nearby suburbs. In addition, the foundation and other gun-rights groups used a separate lawsuit to challenge a ban on handguns in public housing in San Francisco.

In both decisions, the high court essentially said only that there is a right to keep a handgun at home for self-defense. In *McDonald*, the justices only declared the handgun ban unconstitutional — it did not decide the constitutionality of the exceptionally strict gun-control law in Chicago. Instead, it returned the case to the lower courts to decide whether such a statute can be reconciled with the Second Amendment.

Alito, referring to such ambiguity in the *McDonald* case, acknowledged that the decision might “lead to extensive and costly litigation” — a necessity, he stressed in this case, to protect constitutional freedoms.²⁰

Brady Campaign Director Helmke concluded, “It’s going to be a lot more lawsuits. And that’s the main thing. This is good for lawyers. This is good for criminal defense attorneys who are trying to get their clients off.”

However, Helmke noted, assuming that the ruling means the end of gun restrictions would be presumptuous. Criminal defense attorneys are “going to lose most of those lawsuits,” Helmke said, “because the court has made it very clear that as long as you don’t impact the right to have a gun in the home for self-defense,” then gun restrictions will likely stand provided they fall into the “reasonable restrictions” category the court has affirmed in both decisions.²¹

Despite the optimism of Helmke and other gun-control supporters, gun-rights advocates note that they have notched two other significant victories since late 2008. On Feb. 18, 2010, the Supreme Court of Washington state followed the precedent set in *Heller* and likewise ruled in *State v. Sieyes* that the individual right to bear arms guaranteed by the Second Amendment applies to the states through the Due Process Clause of the 14th Amendment.

The case involved 17-year-old Christopher Sieyes, who was pulled over for speeding in April 2007. When he bent over and made a furtive

move, police searched his car and found a semiautomatic handgun under the front seat. State law strictly prohibits minors under 18 from possessing guns, and Sieyes was charged and convicted of criminal possession of a firearm.

Congress gave gun-rights advocates another victory in February 2009. Lawmakers allowed individuals to carry concealed, loaded firearms in most of the national parks, effective February 2010. The law, sponsored by Sen. Tom Coburn, R-Okla., was passed as an amendment to the Credit Card Holder’s Bill of Rights, which President Obama signed into law in May 2009. Supporters of the amendment argued that the ban on weapons in national parks, coupled with differences in state and federal firearms restrictions, made it difficult for gun owners to travel between state and federal lands.²²

The law allows citizens to carry loaded guns in 370 of the 392 national parks, including some of the larger ones such as Yellowstone, Grand Canyon, Great Smoky Mountains, Yosemite and Rocky Mountain.

Gun-control advocates say the new law could transform the national parks from among the safest places in the nation to the most dangerous. “It really is sad that we’ve become such a paranoid society that people want to take guns pretty much everywhere — including national parks,” said Helmke. “When you are at a campfire and people are getting loud and boisterous next to you, you used to have to worry about them quieting down. Now you have to worry about when they will start shooting.”

Bill Wade, president of the Coalition of National Park Service Retirees, also criticized the new law. “People go to national parks to get away from things that they face in their everyday living, where they live and work,” he said. “Now I think that social dynamic is really going to change.”

Chronology

2009

April 4 — Neo-Nazi Richard Poplawski shoots and kills three police officers responding to a 911 call to his home in Pittsburgh. Poplawski surrenders to authorities after a four-hour standoff and faces three counts of murder, among other charges.

April 10 — A man shoots and kills a female classmate and then himself at MacKenzie Fine Arts Center at Henry Ford Community College in Dearborn, Mich.

May 13 — Utah passes Senate Bill 78, which allows gun owners to “lawfully transport and store firearms in a privately owned locked motor vehicle while parked in publicly accessible parking lots controlled by an employer or a business one frequents,” and House Bill 357, which allows gun owners to choose how they carry a handgun for self-defense (open, concealed, unloaded or loaded) in a vehicle without the need to obtain a permit.

May 18 — A 21-year-old man dies after being shot at a Harvard University dormitory during an attempted drug robbery; neither the victim nor the assailants were students at Harvard. Two of the three suspects were charged with first-degree murder among other charges.

May 31 — Dr. George Tiller, 67, one of only a few doctors in the United States who performed late-term abortions, is shot and killed as he hands out church bulletins in the foyer of Reformation Lutheran Church in Wichita, Kan., during Sunday services. Police charged anti-abortion crusader Scott P. Roeder with the shooting. They found a military-style rifle, ammunition, a blasting cap, a fuse cord, a one-pound can of gunpowder and two 9-volt batteries in his car.

June 10 — James W. von Brunn, a convicted felon and “hardcore Neo-Nazi,” shoots and kills a security guard at the U.S. Holocaust Memorial Museum in Washington, D.C.

Aug. 16 — A 23-year-old man shoots and kills three brothers standing outside a mobile home in Menomonie, Wis., and injures a fourth person, before shooting and injuring himself. One of the brothers was 13 years old.

Sept. 3 — A fight at Clark Atlanta University leads to the fatal shooting of a 19-year-old student visiting from Spelman College.

Oct. 22 — Rapper Lil Wayne (Dwayne Michael Carter Jr.) pleads guilty to possession of a loaded .40-caliber semiautomatic gun found on his tour bus in 2007.

Nov. 5 — An Army psychiatrist, Maj. Nidal Malik Hasan,

allegedly opens fire with a semiautomatic handgun at a processing center at Fort Hood, Texas, killing 13 people — almost all soldiers — and wounding over 30 others. Investigators said he had become increasingly upset — and vocal — about his opposition to U.S. involvement in Afghanistan and Iraq.

2010

Feb. 18 — *State of Washington v. Sieyes* upholds an individual's Second Amendment right to possess a firearm for self-protection within the home, as established in the landmark *Heller* case in 2008.

Feb. 20 — Arizona prohibits the sale of firearms at gun shows.

Feb. 22 — Federal Guns in Parks law takes effect, allowing concealed weapons to be carried in national and state parks.

June 28 — Supreme Court rules in *McDonald v. Chicago* that the right to “keep and bear arms” under the Second Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment.

However, Chris Cox, executive director for the National Rifle Association's Institute for Legislative Action, said the idea that parks would become more dangerous was silly and noted that people have been assaulted and even murdered in national parks. "This common-sense measure will enhance the self-defense rights of law-abiding Americans and also ensure uniformity of firearm laws within a state," he said.

Coburn said concerns that the new law would cause increased violence were exaggerated.

"I don't expect anything major to come from this other than to restore the Second Amendment rights taken away by bureaucrats," Coburn said.

Meanwhile, a number of high-profile gun-violence incidents, many involving urban youths, have occurred in the past year and a half.

At the Pentagon on March 4, 2010, a man walked up to the Pentagon Metro entrance and injured two police officers when he opened fire. The police officers then returned fire, killing the gunman.²³

On Feb. 13 2010, a disgruntled Harvard-educated biology professor,

Amy Bishop, allegedly opened fire at a faculty meeting at the University of Alabama in Huntsville, killing three and injuring three others. Years earlier, as a young woman, she shot and killed her 18-year-old brother with a shotgun. At the time, the incident was ruled an accident, but in the wake of the recent shootings, an investigation into her brother's death has been reopened.²⁴

The controversy over gun rights and gun control has caused a surge in gun bills in the 111th Congress; Virginia lawmakers alone have introduced 60 weapons bills in 2010, more than in any year in the past 15 years apart from 2008 — the year after the Virginia Tech shootings.²⁵

Many of the shootings and gun-related deaths have affected inner-city children. According to the Black Star Project, a Chicago-based education program for black youths, 42 children were killed in gun violence in Chicago in 2009.²⁶ The youngest was 3-year-old Jaquan Reed, killed in his home early on the morning of May 17, 2009.²⁷

— **Darrell Dela Rosa**

Notes

¹⁸ *McDonald v. Chicago*, 561 U.S. ____ (2010).

¹⁹ Material in this section taken from Kenneth Jost, *Supreme Court Yearbook 2009-2010*, CQ Press (forthcoming).

²⁰ *McDonald v. Chicago*, *op. cit.*

²¹ PBS "NewsHour," June 28, 2010.

²² Ed O'Keefe, "National Parks Gun Law Takes Effect in February," *Federal Eye*, May 22, 2009, voices.washingtonpost.com/federal-eye/2009/05/national_parks_gun_law_take_ef.html.

²³ Ian Urbina and Anahad O'Connor, "Two Pentagon Police Officers Shot; Gunman Killed," *The New York Times*, March 5, 2010.

²⁴ Jay Lindsay, "Ala. Shooting suspect brilliant, but social misfit," *The Associated Press*, Feb. 20, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/02/20/AR2010022001849.html.

²⁵ Fredrick Kunkle, "Virginia lawmakers aim to loosen firearm restrictions," *The Washington Post*, Feb. 16, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/02/15/AR2010021503292_2.html.

²⁶ Ed Pilkington, "Chicago's Murdered Children," *The Guardian*, Aug. 11, 2009, www.guardian.co.uk/world/2009/aug/11/chicago-children-murders.

²⁷ Jeremy Gomer, "Few answers in 3-year-old's shooting death," *Chicago Breaking News Center*, May 17, 2009, www.chicagobreakingnews.com/2009/05/infant-shot-dead-in-austin-home-police-say.html.

Update